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Nos. 93-860 and 93-1035

Supreme Court, U.S.
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# In the Supreme Court of the United States

**October Term, 1993**

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SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, deceased, et al.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.,
RESPONDENTS.

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RONALD L. HARTMAN, ET AL.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.
RESPONDENTS.

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**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Petitioners are veterans who claim that they were injured by exposure to the herbicide Agent Orange while serving in the Vietnam War. They were parties to a class action in federal district court that was settled in 1984 by the creation of a $180 million fund against which they are eligible to assert claims. The order implementing the settlement enjoins petitioners and other class members from undertaking further litigation against the defendants in any court based on exposure to Agent Orange in Vietnam. In clear violation of this order, petitioners brought suit against defendants in Texas state court. Rather than hold petitioners in contempt or enjoin the state proceeding, the federal district court administering the settlement agreement accepted removal of petitioners' suit to federal court and itself adjudicated petitioners' attack on the settlement. The questions presented are:

1. Whether state court suits brought by disgruntled parties to a federal class action, which could be enjoined by the federal court to protect the integrity of the federal judgment and the settlement fund being administered by the court, may instead be removed pursuant to the All Writs Act, 28 U.S.C. § 1651.

2. Whether petitioners were properly included within the plaintiff class in the federal class action.

## CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Supreme Court Rules, respondents hereby state:

1. *Diamond Shamrock Chemicals Company*. On September 4, 1986, all the outstanding stock of Diamond Shamrock Chemicals Company ("DSCC") was sold to Oxy-Diamond Alkali Corporation, a company under the ownership of Occidental Petroleum Corporation. DSCC (renamed Occidental Electrochemicals Corporation) was subsequently merged into Occidental Chemical Corporation, an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, which is publicly traded on the New York Stock Exchange.

2. *The Dow Chemical Company*. The Dow Chemical Company is a publicly traded corporation that has the following publicly traded subsidiaries and affiliates:

Marion Merrell Dow, Inc.
Destec Energy, Inc.

3. *Hercules Incorporated*. Hercules Incorporated is a publicly held corporation whose shares are traded on the New York Stock Exchange. It has no parent or subsidiary company required to be listed herein.

4. *Monsanto Company*. Monsanto Company has no publicly owned parent company or affiliates. The following Monsanto Company subsidiaries have issued shares to the public:

Southwall Technologies, Inc.
The Macneal-Schwendler Corp.
Micro General Corp.
Dura Pharmaceutical
Gensia Pharmaceuticals
Microfluidics

5. *T.H. Agriculture & Nutrition Co., Inc.* T.H. Agriculture & Nutrition Co., Inc. is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Philips Electronics N.V., a publicly held corporation based in The Netherlands.

6. *Uniroyal, Inc.* Prior to the commencement of the above-captioned actions, Uniroyal, Inc. was a publicly held company. During the course of these actions the shares of Uniroyal, Inc. were acquired by CDU Holding, Inc. and Uniroyal was liquidated. CDU Holding, Inc. has no subsidiaries.

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## COUNTERSTATEMENT OF THE CASE

The long and complex history of the *Agent Orange* litigation is reflected in part by the ten previous unsuccessful certiorari petitions filed in the case.[1] Accounts of various phases of the litigation are in print. See, *e.g.*, Pet. App. A28-A33 (citing some of the "hundreds of published and unpublished decisions" rendered in the litigation).[2] The following statement focuses on the facts pertinent to petitioners' current claims. Petitioners' account of the relevant facts is distorted and misleading.

### A. The *Agent Orange* Class Action

In 1978, Vietnam veterans and family members began filing individual and representative actions in federal and state courts around the country against respondents, manufacturers of the herbicide Agent Orange, for injuries allegedly caused by the veterans' exposure to Agent Orange in Vietnam. Ultimately some 600 suits, involving 15,000 named plaintiffs resident in virtually every state of the nation and several foreign countries, were

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[1] See *Dow Chemical Co. v. Brown*, petition for cert. filed, 61 U.S.L.W. 3195 (U.S. Sept. 22, 1992) (No. 92-438) (remand of civilians' *Agent Orange* claims unreviewable), cert. denied, 113 S. Ct. 599 (1992); *In Re "Agent Orange" Product Liability Litig. ("Agent Orange")*, 818 F.2d 145 (2d Cir. 1987) (approving certification and settlement of the class action), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 179 (2d Cir. 1987) (approving plan for distributing settlement fund), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 187 (2d Cir. 1987) (affirming dismissal of opt-out claims), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 201 (2d Cir. 1987) (affirming dismissal of direct claims against the United States), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 210 (2d Cir. 1987) (affirming dismissal of Agent Orange claims of certain civilians), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 216 (2d Cir. 1987) (overturning fee arrangement among plaintiffs' counsel), cert. denied, 484 U.S. 926 (1988); *Agent Orange*, 821 F.2d 139 (2d Cir.) (affirming order unsealing confidential pretrial discovery materials), cert. denied, 484 U.S. 953 (1987); *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.) (denying mandamus seeking to vacate class certification), cert. denied, 465 U.S. 1067 (1984); *Agent Orange*, 635 F.2d 987 (2d Cir. 1980) (reversing finding of federal question jurisdiction), cert. denied, 454 U.S. 1128 (1981).

[2] "Pet. App." refers to the appendix to the certiorari petition in No. 93-860. "ASA" refers to the Supplemental Appendix filed by respondents as appellees in the court of appeals.

transferred by the Panel on Multidistrict Litigation to the Eastern District of New York for coordinated and consolidated pretrial proceedings. *In re "Agent Orange" Product Liability Litigation*, MDL No. 381.

The transferee court's ruling that plaintiffs' claims arose under federal common law and that the court accordingly had federal question jurisdiction was reversed by a divided panel of the court of appeals, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981), and the litigation thereafter proceeded on the basis of diversity jurisdiction. 506 F. Supp. 762 (E.D.N.Y. 1980).

*1. Class Certification And Settlement*

Plaintiffs argued from the outset for a broad class, contending that *all* Vietnam veterans had been exposed to Agent Orange and had thereby suffered an "injury" compensable under the law of torts. See Pet. App. A13. Thus, the amended complaints filed in the lead action claimed that the action was brought on behalf of 2.4 million veterans who had served in Vietnam, all of whom allegedly had been exposed and injured, including "those individual veterans manifesting no symptoms of illness and disease at present, but at risk of genetic and somatic damage." ASA 1, 19-20.

Defendants opposed class certification and moved to dismiss the so-called "at risk" or "after-manifested" claims. Plaintiffs defeated the motion, arguing successfully in both the district court and Second Circuit (see 635 F.2d at 992-93 n.10) that "[n]ot all courts adhere to the rule that an injury and damage are not compensable simply because they are not presently and immediately observable." ASA 350.

In December 1980 the district court determined to certify a plaintiff class in the lead action under Fed. R. Civ. P. 23(b)(3). The court proposed to define the class as

> persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom.

506 F. Supp. at 788. This was, in the court's view, "the broadest possible class" (*ibid.*), one that included "over two million Vietnam

veterans and their families." *Id.* at 791. However, no certification order issued at the time.

In December 1983, after extensive discovery and motions and over defendants' objection, the district court formally certified a Rule 23(b)(3) "common question" class with opt-out rights to address the common issues of general causation and the military contractor defense. Adhering to its intent to define the class broadly, the court modified the language of the definition so that the class consisted of

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange. * * * The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

100 F.R.D. 718, 729 (E.D.N.Y. 1983). The phrase "persons * * * who were injured" was chosen in response to defendants' objection that the earlier definition ("persons who claim injury") lacked an objective standard. See ASA 403-05; 100 F.R.D. at 728-29.

The district court ordered plaintiffs' counsel to notify class members of the certification and the right to opt out -- by mail where feasible, and also by radio, television, magazine and newspaper announcements in this country, Australia and New Zealand. 100 F.R.D. at 729-31. The court of appeals denied defendants' mandamus petition to vacate the class certification and notice plan, and this Court declined review. 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).

On May 7, 1984, the day the trial was to begin, the parties reached a tentative settlement. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising then or in the future out of veterans' exposure to Agent Orange in Vietnam, and provided that class members' exclusive remedy against defendants was a claim against the fund. The Settlement Agreement made clear that "[t]he [c]lass specifically includes persons who have not yet manifested injury" (597 F.

Supp. 740, 865 (E.D.N.Y. 1984)), and it permanently barred class members from instituting or maintaining any action against defendants based on exposure to Agent Orange. A reserve of $10 million out of the $180 million was created to indemnify the defendants from any state court judgments obtained by "opt-out" class members. Any part of the reserve not used reverts to the benefit of the class members. 611 F. Supp. 1396, 1437 (E.D.N.Y. 1985).

A settlement notice was directed to class members, some of whom objected to the settlement and moved for certification of a sub-class of objectors. The objectors argued in part that the proposed settlement improperly broadened the class definition to include "after-manifested" or "at risk" claimants. ASA 642-66; 899-902. The district court denied the objectors' motion, finding that "[n]o purpose would have been served by appointing counsel for a subclass of disappointed claimants." 597 F. Supp. at 757; see also ASA 729-33 ("I defined the class in my class action opinion and then notice went out on that class as then defined. * * * I believe the original language properly interpreted included after manifestations.").

After extensive, nationwide fairness hearings, the district court granted final approval to the Settlement Agreement in June 1985 (611 F. Supp. 1296, 1347 (E.D.N.Y. 1985)), having found that the weaknesses in plaintiffs' case and the strength of defendants' defenses were decisive factors. See 597 F. Supp. 740 (E.D.N.Y. 1984). On July 9, 1985, the court entered an Order and Final Judgment of Dismissal, which directed consummation of the settlement "in accordance with its terms," and (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of any of the class action complaints; and (3) retained jurisdiction over the class action for the purpose of maintaining, administering and distributing the settlement fund. See 618 F. Supp. 623, 624 (E.D.N.Y. 1985). Under the distribution plan adopted by the court, 75% of the $180 million settlement fund is to be paid to class members for nontraumatic death or total disability of class member veterans who were exposed to Agent Orange, with most of the remainder allocated to

a class assistance program to fund projects and services of benefit to the entire class.

### 2. *The Second Circuit Affirms The Class Certification and Settlement*

Appeals were taken from various rulings and the final judgment of the district court. Specifically assigned as errors were the certification of the class, the inclusion in the class definition of persons with "after-manifested" injuries, the adequacy of notice, the adequacy of the representation given the absent class plaintiffs and the fairness of the settlement. The court of appeals affirmed the certification and ensuing settlement of the class action in all relevant respects. 818 F.2d 145 (2d Cir. 1987). This Court denied multiple petitions for certiorari. 484 U.S. 1004 (1988).

The Second Circuit upheld certification of a Rule 23(b)(3) class because of the centrality of one major issue -- the military contractor defense. 818 F.2d at 166. It agreed with the district court that the interests of all class members, regardless of the nature of their claims, were identical with regard to the facts and law relevant to that potentially dispositive defense, *id.* at 166-69, and that class members with actual notice would adequately have represented class members unaware of the action. *Id.* at 167-69.

In affirming the adequacy of notice, the Second Circuit held that the district court's notice plan was a "creative approach appropriate to this unique case." 818 F.2d at 167. The court rejected the argument that all 2.4 million class members should have been sent letter notice, stating that "far fewer than that number were exposed to Agent Orange" and that "many of the members of the class were unknown and could not be located through reasonable efforts." *Id.* at 169. The court took judicial notice of the widespread publicity the litigation had received and concluded that "no practical problem exists as to the adequacy of the notice." *Ibid.*

Finally, the Second Circuit approved the settlement as fair in light of the pervasive factual and legal difficulties faced by the plaintiffs in establishing causation and exposure to Agent Orange and in avoiding the statute of limitations (818 F.2d at 172-173), as

well as the court's "conviction that the military contractor defense absolved the [defendants] of any liability." *Id.* at 151.

After this Court denied certiorari, the payment program and class assistance program began making disbursements and grants; by then, the settlement fund had grown (with interest) to $240 million. As of January 1994, the payment program has paid more than 38,000 claims and disbursed more than $164 million to disabled veterans and their survivors. Letter from Special Master Deborah E. Greenspan to Judge Jack B. Weinstein (Jan. 14, 1994) ("Special Master's Letter"). *More than 55% of all disability claims paid by the fund were for disabilities with onset after May 7, 1984; and more than 61% of all survivor claims paid by the fund were for deaths occurring after May 7, 1984.* Indeed, two of the named plaintiffs in the *Ivy* case, who are petitioners herein, filed claims against the fund and received benefits in 1991. See Pet. App. A44-A45. In addition, through November 1993, the class assistance program had awarded over $40 million in grant funds, benefiting more than 148,000 veterans and family members nationwide. Fifth Annual Report of the Agent Orange Class Assistance Program (Nov. 1993), at pp. 1, 10.

### B. *Ivy* and *Hartman*

The two cases now before the Court were begun in Texas state court in 1989 and 1990. Claiming to represent a class of those similarly situated, petitioners alleged that their injuries from exposure to Agent Orange had manifested themselves or been discovered only after the deadline to opt-out of the *Agent Orange* class and that they therefore were not members of that class and were not bound by the class action dismissal order. Purporting to rely solely on state law, petitioners sought compensatory and punitive damages from defendants and the creation of a fund to monitor the health of all Agent Orange-exposed Vietnam veterans and their family members for the next 20 years. ASA 760, 776-77, 791, 805.

Defendants removed the lawsuits to federal court on federal question grounds (claiming "artful pleading" and "complete federal preemption"), and the actions were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of New York. In January 1990 the *Ivy* plaintiffs petitioned the Second Circuit for a

writ of mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The court of appeals denied the petition, ruling that subject matter jurisdiction should be decided in the first instance by the transferee court. *In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

In October 1990 plaintiffs moved to remand their actions to Texas state court. In December 1990 defendants moved under the All Writs Act for an order permanently enjoining petitioners from prosecuting these actions because petitioners were members of the *Agent Orange* class and therefore were bound by the anti-litigation provision of the district court's order approving the Settlement Agreement. Defendants also moved to dismiss petitioners' claims and for other relief.

*1. Dismissal By The District Court*

The district court ruled in October 1991 that it did have subject matter jurisdiction of petitioners' claims, and it denied petitioners' motion to remand and granted defendants' motion to dismiss. Pet. App. A47-A56. The court first held that petitioners "are members of the *Agent Orange* class." *Id.* at A49. It observed that, in approving the class certification and settlement, both it and the court of appeals had previously ruled that the class definition included persons with "after-manifested" injuries. The court rejected petitioners' assertion that after-manifested claimants could not properly have been included in the class because of inadequate notice and representation. *Id.* at A54.

Having determined that petitioners were members of the *Agent Orange* class, the district court went on to conclude that petitioners' new lawsuits violated the injunction against such litigation contained in the class action final judgment; that the suits constituted a "direct threat to the continuing viability of the judgment settling the class action"; and that, if successful, the suits would "automatically reduce the sums available for other class members." Pet. App. A42, A49-A52, A55. Petitioners' claims, the court observed, "are a challenge to the integrity of the Settlement Agreement and the authority of this court." *Id.* at A51.

In these circumstances, the district court held that it had "the power and the obligation to protect and effectuate its orders and

final judgments in the *Agent Orange* litigation." Pet. App. A51. The court noted that if the *Ivy* and *Hartman* cases had remained in state court, it would have had authority under the All Writs Act to enjoin any state court proceedings inconsistent with the court's prior orders. *Id.* at A55. Taking jurisdiction of the cases after they were voluntarily removed was a "less drastic, and therefore preferable result." *Ibid.* (quoting *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989)). In view of the foregoing, the court said that it "need not address defendants' motion for a permanent injunction." Pet. App. A56.

### 2. *The Second Circuit Affirms The Dismissal*

The Second Circuit affirmed the dismissal of petitioners' complaints, holding that it was "crystal clear" (Pet. App. A10) that the district court had certified a class in 1984 that included veterans who had been exposed to Agent Orange but had not yet manifested injury.

> There * * * can be no question concerning the district court's intent or that of the parties to the Settlement Agreement. 'At risk' veterans, i.e., victims with no visible symptoms, were included in the plaintiff class.

*Id.* at A14. Indeed, the court of appeals noted that, "[f]rom the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this meaning and urged it repeatedly upon the district court" (*id.* at A13), and that it had recognized the propriety of including "at-risk" veterans in its 1987 opinion affirming the class settlement. The Second Circuit rejected petitioners' current arguments against class membership as "no stronger now than they were when made in 1987." *Id.* at A14.

The court of appeals also ruled that, given "the 'exceptional circumstances' surrounding the instant case," and the need "'to protect or effectuate' the district court's *Agent Orange I* judgment," removal of petitioners' suits to federal court was a proper use of federal judicial power under the All Writs Act. Pet. App. A8-A10. The court stated that "[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the

*Agent Orange I* settlement mechanism would be substantial" and that the parties to the settlement -- including petitioners -- "implicitly recognized this when they agreed that all future suits by class members would be permanently barred." *Ibid.*

Finally, the Second Circuit rejected petitioners' attack on the class notice, stating that it had held that the notices were adequate in its opinion approving the settlement and that its "view has not changed." Pet. App. A16. The court of appeals also rejected plaintiffs' claims of inadequate representation, noting that petitioners "do not challenge the qualifications of the *Agent Orange I* class counsel" and that "their conflict-of-interest claims are unpersuasive." *Id.* at A17. The court explained that it would ordinarily have considered the appointment of a guardian to represent the interests of absent claimants with questionable injuries, but that such additional protections were unnecessary here given the

> unique circumstances surrounding *Agent Orange I* -- in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now * * *.

*Id.* at A21. In sum, the court concluded that the "fundamental fairness of the *Agent Orange I* settlement remains unshaken" and that the chances of recovery by Agent Orange plaintiffs "are nearly as speculative today as they were at the time of settlement." *Ibid.*

## ARGUMENT

Petitioners' counsel, presumably aware that this case is driven by a unique set of facts and involves no issue on which the lower courts disagree, have presented questions that vastly distort and overstate what the court of appeals actually held. Contrary to the implicit premise of the first question stated in each petition, the Second Circuit did not confer broad discretion on federal judges to invoke the All Writs Act to remove otherwise unremovable cases from state court whenever they perceive a need to do so. As for the questions related to the merits of the inclusion of petitioners in the *Agent Orange* class (question 2 in *Ivy* and questions 4-5 in *Hartman*), the briefest comparison of petitioners' highly slanted

formulations to the Second Circuit's actual ruling readily shows that the case does not present the issues posed by petitioners. The gross distortions embodied in the formulation of the questions presented eloquently testify to the unsuitability of these cases for this Court's review.

Similarly, petitioners' arguments gloss over several critical factors that demonstrate the uniqueness and narrowness of the Second Circuit's decision. Petitioners barely mention that it was an indispensable ingredient of the global settlement of the *Agent Orange* class action that the settlement, which required defendants to create a $180 million fund to benefit class members, would mark an end to *all* litigation by Vietnam veterans and their families of claims arising from exposure to Agent Orange. To this end, in approving the final settlement, the district court entered an order barring class members from filing suit in the future in any court seeking remedies from defendants for injuries allegedly caused by exposure to Agent Orange during the Vietnam War.

Petitioners bury in a footnote their concession that they are members of the plaintiff class that entered into this settlement. Ivy Pet. 7 n.8. They do not mention that many thousands of the claimants whom petitioners purport to represent -- including two of the named petitioners -- have already claimed and received benefits from the settlement fund. Nevertheless, in clear violation of the federal court order implementing the settlement, petitioners brought these class actions in Texas state court seeking to hold defendants liable for injuries suffered as a result of exposure to Agent Orange in Vietnam. Rather than holding petitioners in contempt or enjoining the state court proceedings, as it could have done, the district court took the far less intrusive step of accepting removal of the cases to federal court and adjudicating petitioners' numerous attacks on the settlement.

The district court's actions unquestionably were correct in the unique circumstances of this case, do not conflict with the decision of any other court, and raise no legal issue warranting further review. This Court has held that a district court has authority under the All Writs Act to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S.

159, 172 (1977). As the Second Circuit explained (Pet. App. A9) (emphasis added):

> Given the "exceptional circumstances" surrounding the instant case, issuance [of the writ] was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.*

The Second Circuit also correctly rejected petitioners' challenges to the wording of the class notice and to the adequacy of their representation by class counsel. In finding the notice sufficient and the representation adequate, the court of appeals relied, among other things, on the fact that persons with before-manifested and those with after-manifested injuries were identically situated with respect to the military contractor defense, and that the settlement fund conferred equal benefits on both groups.

In sum, contrary to petitioners' rhetoric, the courts below did not employ the All Writs Act as an independent and free-wheeling basis for federal jurisdiction (which already existed with respect to these petitioners by virtue of their membership in the class) and did not countenance class action procedures that raise any legal question of importance beyond the specific facts of this case. If petitioners were permitted to bring collateral attacks on the *Agent Orange* settlement in state court, it would render worthless the "anti-litigation" provisions of the Settlement Agreement, to which petitioners were parties, and would jeopardize the continued validity of the entire settlement, pursuant to which some $164 million has already been expended for the benefit of class members. The courts below acted responsibly, and well within their authority, in preserving the integrity of this decade-old federal court judgment.

## I. THE DISTRICT COURT APPLIED SETTLED PRINCIPLES GOVERNING THE ALL WRITS ACT TO GRANT A REMEDY APPROPRIATE TO THE EXCEPTIONAL FACTUAL CIRCUMSTANCES OF THIS CASE

Petitioners assert that the Second Circuit has radically "transform[ed] the All Writs Act into a general grant of federal jurisdiction," giving federal district judges unbridled discretion to remove unremovable cases from state courts "when the need arises." Ivy Pet. 2. In fact, the Second Circuit has simply followed this Court's settled precedents that a federal court has the power under the All Writs Act[3] in "exceptional circumstances" to issue such writs as may be "necessary or appropriate" to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172. Compare petitioners' overblown and deceptive assertions with the actual statements of the Second Circuit:

| PETITIONERS' ASSERTIONS | SECOND CIRCUIT OPINION |
|---|---|
| In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the district judge, "when the need arises." **A8-A9**. Ivy Pet. 2. | A district court, *in exceptional circumstances*, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued *in its exercise of jurisdiction otherwise obtained.*" *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). |
| [T]he [Second Circuit] made clear that district judges are free to resort to All Writs | |

[3] The All Writs Act grants federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**.

Ivy Pet. 21.

[A]ccording to the Second Circuit, [the All Writs] Act provides an independent source of authority for subject-matter jurisdiction on removal.

Ivy Pet. 15.

Pet. App. A8 (emphasis added).

In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion *extraordinary remedies when the need arises*, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion.

Pet. App. A9 (emphasis added).

Thus, the Second Circuit did not announce "a radical new removal doctrine." Ivy Pet. 2. Rather, it carefully applied this Court's decisions construing the All Writs Act to the exceptional factual circumstances of this case. In approving use of the Act, the court of appeals emphasized that this case involved:

- Ongoing federal proceedings implementing a federal class action settlement;

- A federal court order barring class members from filing state court actions;
- Petitioners' blatant violation of that order, resulting in
- A direct threat to the viability of the ongoing federal proceedings and the continued administration of the settlement fund.

Pet. App. A9-A10. Once the Second Circuit's decision is accurately stated, it is apparent that that decision is plainly correct and completely in accord with the decisions of this Court and the other courts of appeals. Review of this unique case would provide little guidance to courts in future cases. In such circumstances, this Court should not rush to consider petitioners' distorted version of the removal and All Writs Act issues.

### A. There Is No Conflict Among The Circuits

It is highly revealing that petitioners relegate to a footnote their assertion (Ivy Pet. 11 & n.14) that the Second Circuit's decision conflicts with cases from the Fifth, Ninth, and Tenth Circuits. There is no conflict whatsoever. Both the decision below and the allegedly conflicting cases follow this Court's long-settled rule that the All Writs Act permits federal courts to issue writs "necessary or appropriate" in aid of "jurisdiction otherwise obtained" but does not itself grant original federal jurisdiction.[4] *New York Telephone*, 434 U.S. at 172. None of these cases criticizes any of the others, and there is no underlying disagreement in principle, even in *dicta*.

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[4] Many of the cases cited by petitioners do not involve removal at all and merely restate this general rule. See *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972) (All Writs Act "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *Brittingham v. U.S. Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) (All Writs Act empowers federal courts "to issue writs in aid of jurisdiction previously acquired on some other independent ground"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) (All Writs Act "does not operate to confer jurisdiction; ancillary jurisdiction is provided where jurisdiction is otherwise already lodged in the court").

The only two circuits that have considered removal in the context of the All Writs Act, the Second and the Ninth, are in accord. Both circuits assume that removal is one of the remedies potentially available under the Act in an appropriate case. Both circuits recognize *New York Telephone* as controlling authority and simply apply it to the facts presented. See Pet. App. A8-A9 (citing *New York Telephone*); *Westinghouse Electric Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993) (same); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989) (same). See also *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992).

Under *New York Telephone*, the courts must determine whether removal is "necessary or appropriate" to "effectuate and prevent the frustration of orders [a federal court] has previously issued in its exercise of jurisdiction otherwise obtained." 434 U.S. at 172. In this case, the district court "otherwise obtained" jurisdiction over the parties and the subject matter based on its continuing jurisdiction of the *Agent Orange* class action. See Pet. App. A49-A51. (It bears repeating that petitioners do not challenge the conclusion of both lower courts that they are members of the *Agent Orange* class. Ivy Pet. 7 n.8). Finding that the present suits were "a direct threat" to its orders in ongoing federal proceedings, the court accepted removal under the All Writs Act to "effectuate and prevent the frustration" of the Settlement Agreement and to enforce its order barring relitigation of *Agent Orange* claims by class members. Pet. App. A54-A55. The Second Circuit agreed, holding that the district court properly invoked the All Writs Act to "guard[ ] the integrity of its rulings in complex multidistrict litigation *over which it had retained jurisdiction.*" *Id.* at A9 (emphasis added).

In *Westinghouse Electric*, by contrast, the Ninth Circuit determined that the particular state court proceedings at issue would *not* in fact interfere with "the interpretation or the enforcement" of a prior federal protective order. 992 F.2d at 937. Based on that factual determination, it denied removal under the All Writs Act, applying the same *New York Telephone* standard that the Second Circuit employed in this case.

In sum, petitioners' lengthy academic discussion (Ivy Pet. 11-23) of the history of removal statutes and the All Writs Act is wholly beside the point. The Second Circuit did *not* grant "permission to remove cases whenever district judges find 'exceptional circumstances'" (Ivy Pet. 19) and it did *not* ignore the fundamental principle that "only Congress's jurisdictional statutes can authorize jurisdiction in a case" (*id.* at 11). The court of appeals explicitly held that "Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms." Pet. App. A10 (citations omitted). Petitioners do not take issue with this conclusion. On the facts of this case, no circuit would have reached a contrary result.

### B. The District Court Had Power Under The All Writs Act "To Effectuate And Prevent The Frustration" Of Its Orders Barring *Agent Orange* Class Members From Filing Actions In State Courts

Petitioners argue (Ivy Pet. 23; Hartman Pet. 47) that, "at minimum, review should be granted * * * to clarify the boundary of lower courts' authority under the All Writs Act." There is no merit in that suggestion. The All Writs Act gives a federal court the power to issue "appropriate" writs "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone*, 434 U.S. at 172. That is precisely what the district court did here.

#### *1. Jurisdiction was "otherwise obtained" in this case as ancillary to the district court's "continuing jurisdiction" over the* Agent Orange *class action.*

It is well-settled that federal courts have ancillary jurisdiction to enforce their orders and judgments, including injunctive orders and decrees.[5] As noted above, the district court had "continuing

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[5] See, *e.g.*, *Finley v. United States*, 490 U.S. 545, 551 (1989) (ancillary jurisdiction may be asserted even over non-parties "when necessary to give effect to the court's judgment"); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (Congress amended Anti-Injunction Act to permit courts to issue injunctions to "protect or effectuate its judgments," codifying Justice Reed's

jurisdiction" over the *Agent Orange* class action and thus had ancillary jurisdiction to enforce its orders implementing the Settlement Agreement. Pet. App. A10, A49-51.

From the defendants' perspective, the most important consideration in agreeing to settle this action, despite their strong defenses, was the assurance that *Agent Orange* litigation by Vietnam veterans would be brought to an end. That assurance was guaranteed in two ways: the fact that the *Agent Orange* class included veterans with after-manifested symptoms, and the provisions of the Settlement Agreement and district court order that barred new actions brought by members of the class. In providing that "[t]he Settlement Agreement shall be consummated in accordance with its terms," the district court specifically ordered that every member of the class "is hereby forever barred from instituting or maintaining any action against any of the defendants * * * arising out of or relating to, or *in the future arising* out of or relating to, the subject matter of * * * this class action." 618 F. Supp. at 624-25 (emphasis added). The district court found that petitioners had violated this injunction, which was expressly directed against persons who might thereafter assert claims based on after-manifested injury ("in the future arising"). See Pet. App. A51, A52.

Thus, as both courts below held, the district court had jurisdiction to enforce its injunction against relitigation by class members, in addition to its general retained jurisdiction to enforce the Settlement Agreement and administer the settlement fund. Pet. App. A10, A21, A51-52. Petitioners, who concede that they are members of the plaintiff class subject to the anti-litigation provisions of the Settlement Agreement, do not take issue with any of these determinations, which are fatal to their legal position.

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dissenting views in *Toucey*, *infra*); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 146 (1941) (Reed, J., dissenting). The principle applies with undiminished force to injunctive orders. See, *e.g.*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452-55 (1932); *In re Debs*, 158 U.S. 564, 594 (1895).

2. *The district court exercised its power under the All Writs Act "to effectuate and prevent the frustration of" its orders.*

By bringing these actions, petitioners "challenge the binding effect of the Settlement Agreement and the order of [the district] court prohibiting new suits by class members." Pet. App. A55. Petitioners "seek to avoid" and "circumvent" the district court's orders and judgment. *Id.* at A49, A42. Petitioners' suits, if successful, "will automatically reduce the sums available for other class members." *Id.* at A42. Based on these findings, the district court determined that petitioners' suits constitute "a direct threat to the continuing viability of the judgment settling the class action." *Id.* at A55. The Second Circuit agreed that "the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial" and concluded that the district court "was enforcing an explicit, ongoing order" and "guarding the integrity of its rulings." *Id.* at A8-A9.

Petitioners take issue with these fact findings, but their arguments are disingenuous. They assert that "[t]heir case manifestly was not * * * a 'challenge[ ]' to the settlement agreement"; rather, they simply "sought to pursue their own suit for money damages, entirely separate from the settlement" (Ivy Pet. 22; Hartman Pet. 41). Nowhere do petitioners acknowledge that, as members of the *Agent Orange* class, they were parties to and beneficiaries of the settlement, much less explain how their actions in bringing suit against defendants can be reconciled with the anti-litigation provisions of the Settlement Agreement. Petitioners also assert (Ivy Pet. 22-23; Hartman Pet. 42 n.35) that "[n]othing about [their] Texas lawsuit affects the operation of the [Settlement] Fund." But defendants entered into the settlement, and agreed to put $180 million into the settlement fund, on the express understanding that they would not be subject to any future litigation brought by members of the *Agent Orange* class. It is by no means clear how the courts would or could unscramble the eggs if that understanding is invalidated at this late date.

*3. The district court's remedy was "appropriate" on the facts of this case.*

Where, as here, there is federal jurisdiction and a need to protect the integrity of ongoing federal proceedings, this Court interprets the All Writs Act "flexibly" to determine whether the particular remedy employed is "appropriate" on the facts of the particular case. *New York Telephone*, 434 U.S. at 173. Congress specifically amended the All Writs Act in 1948 to confirm the power of the federal courts to issue "appropriate" writs as well as "necessary" writs. *Ibid.* The All Writs Act serves as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Ibid. at 172, quoting Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation omitted). The court may issue such writs as are "calculated in its sound judgment to achieve the ends of justice entrusted to it." *Ibid., quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

Petitioners ask the Court to look to the analogy of statutes granting removal jurisdiction to determine whether removal is an appropriate remedy under the All Writs Act. Because Congress did not explicitly authorize removal jurisdiction to enforce and prevent the frustration of federal court orders, petitioners contend that federal courts are powerless to order removal as a remedy, even if removal is otherwise appropriate. Petitioners' contention runs flatly contrary to the Court's entire body of All Writs Act jurisprudence. While removal *jurisdiction* is determined in accordance with the removal statutes, the appropriateness of removal *as a remedy* where jurisdiction is "otherwise obtained" is determined under the Act. The whole point of the All Writs Act is to provide federal courts with remedies not otherwise specifically authorized by Congress. Congress plainly intended the All Writs Act to give the federal courts acting to enforce their orders broader powers than they would otherwise have, or there would have been no need for the Act.

This Court has repeatedly held that courts have power to enforce their orders and preserve their jurisdiction under the All Writs Act through means that Congress did not explicitly authorize. *New York Telephone, supra; Harris v. Nelson, supra; Federal*

*Trade Comm. v. Dean Foods Co.*, 384 U.S. 597, 608-11 (1966); *Scripps-Howard Radio, Inc. v. Federal Communications Comm.*, 316 U.S. 4, 10-11 (1942). In *New York Telephone*, the Court approved a writ mandating telephone company assistance in the use of pen registers, despite the fact that Congress had authorized such assistance in other statutes governing electronic surveillance but had not done so in the statute governing pen registers. 434 U.S. at 176-78. In *Harris*, Congress had provided by statute for interrogatories in habeas corpus proceedings in some limited circumstances, but not in the circumstances before the Court. The Court nevertheless upheld the lower court's power to order interrogatories under the All Writs Act, as "necessary or appropriate in aid of [its jurisdiction] * * * and agreeable to the usages and principles of law. 28 U.S.C. § 1651." 394 U.S. at 300.

In approving a writ mandating assistance by non-parties in the use of pen registers, the Court in *New York Telephone* relied on a "clear indication by Congress that the pen register is a permissible law enforcement tool." 434 U.S. at 176-78. Similarly, by passing the Anti-Injunction Act, 28 U.S.C. § 2283, Congress has specifically approved the power of federal courts to enforce their orders and to prevent relitigation in state court proceedings of issues that have already been determined in federal court. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. at 524. The Second Circuit found that such power was available as an alternative in this case. Pet. App. A10. Under *New York Telephone*, the district court had the power to employ other "appropriate" remedies under the All Writs Act, including the remedy of removal employed in this case, whether or not Congress had specifically authorized such a remedy.[6]

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[6] Petitioners attempt to explain this Court's recent denial of review in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989), by asserting that any error in ordering removal there was "purely a procedural one" and that "any reversal * * * would merely [have] delay[ed] the ultimate implementation of the district court's remedial orders." Ivy Pet. 24-25 n.32 (quoting *Yonkers* brief in opposition). Petitioners fail to realize that the very same argument could be made in opposition to their effort to obtain review of the removal issue in this case. If this Court were to conclude that the district court improperly accepted removal under the All Writs Act, the district

### C. The District Court's Order Is Supported By Principles Of Federalism And Comity

The remedy employed by the district court was particularly "appropriate" when viewed in light of principles of federalism and comity. The courts below gave careful consideration to the need to prevent unnecessary friction between the state and federal courts and fashioned a remedy that sought to accommodate the competing interests.

The district court was faced with petitioners who had flagrantly violated its order barring the filing of new actions in state court and who threatened to prejudice the rights of other class members and defendants under a federal judgment. And, of course, if these petitioners could maintain their actions in Texas state courts, nothing would stop other veterans from bringing similar actions -- producing potentially inconsistent rulings on the preclusive effect of the federal action -- in each of the other 49 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. The court concluded that it had the power under the Anti-Injunction Act to enjoin the Texas state court actions as necessary to prevent "rulings inconsistent with the prior federal order." Pet. App. A55. See *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993). In addition, it considered the possibility of enforcing its order through the contempt power, which also would have made a shambles of the Texas proceedings. *Ibid.* The court ultimately concluded that removal was "the preferred method of enforcement, since it *affords greater comity to state courts* and is less burdensome on the parties than an injunction or contempt citation would be." *Ibid.* (emphasis added).

The court of appeals agreed that the case was properly a matter for the federal rather than the state courts and that the district court had the power to enjoin the state proceedings under the Anti-Injunction Act. Pet. App. A10. As the court below stated in

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court on remand unquestionably could enjoin petitioners from proceeding against defendants in state court. Indeed, the court has held defendants' motion for an injunction in abeyance. Pet. App. A55-A56. Thus, the question that petitioners have presented to this Court will have no bearing on the ultimate outcome of this case.

response to petitioners' argument that the state courts were fully capable of deciding the res judicata effect of a federal judgment:

> The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it had already decided, and guarding the integrity of its rulings in [a] complex multidistrict litigation over which it had retained jurisdiction.*

*Id.* at A9 (emphasis added). The Second Circuit pointedly remarked that petitioners were advocating not comity, but abdication of the duty of the federal courts to enforce their orders. The court explained that such a result "is not the sort of federal/state comity envisioned" in this Court's precedents since it "would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments." *Id.* at A11.

Petitioners -- who seek individual advantage at the expense of their fellow class members and who have been found in direct violation of a federal court order -- ask this Court to hold that the federal district court with continuing jurisdiction over the class action is powerless to do anything about it. And they make this astounding argument in the name of federalism and comity! This Court has held that federalism and comity required that a Texas state court judgment be challenged in the Texas state courts, not in the New York federal courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). On the facts of this case, neutral application of these principles required that petitioners challenge the orders and injunctions of the New York federal court in the New York federal court, not in Texas state court.

As members of the *Agent Orange* class, petitioners were bound by the Settlement Agreement and the district court's order barring the filing of this suit in state court. They were obligated to obey these orders until such time as the orders might be modified or vacated either by the district court or on appeal. This Court has repeatedly affirmed the "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are

expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980).[7]

Had the district court relied on the contempt power to punish petitioners for violating its orders, petitioners' due process objections would not have been a defense. *Walker*, 388 U.S. at 318-21. Had the district court simply enjoined petitioners' state court suit, petitioners' due process objections would not have been heard by any court. Instead, the district court employed the All Writs Act to preserve its authority to enforce its orders and implement the Settlement Agreement, while minimizing any possibility of conflict with the Texas state courts and granting petitioners the opportunity they sought to challenge the court's orders without punishing them for having violated those orders. This accommodation of state and federal interests was surely "appropriate" under the All Writs Act.

Principles of federalism and comity do not require that a federal court stand helpless while its orders are ignored. Petitioners improperly challenged and indeed violated federal court orders. Their challenges belonged in the federal court responsible for enforcing those orders.[8]

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[7] See *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Walker v. City of Birmingham*, 388 U.S. 307, 313-15 (1967). Petitioners were required to move the federal court that issued the order barring filing of state court suits for modification of that order instead of violating the order and seeking to prevent the federal court from enforcing it. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976); *United States v. United Mineworkers of America*, 330 U.S. 258, 293-94 (1947).

[8] The brief filed by several states as *amici curiae* proceeds under a material misunderstanding of both the facts of this case and the Second Circuit's narrow decision. Thus, *amici* are simply wrong in their premise that "petitioners' case could [not] have been brought in a federal district court in the first instance." Am. Br. 1. In fact, petitioners' case *was* brought in federal district court, because petitioners were parties to the *Agent Orange* class action in the Eastern District of New York. See Pet. App. A54. Petitioners also could have filed a motion in federal court to be removed from the *Agent Orange* class for due process reasons. Moreover, petitioners violated an express anti-litigation provision of the federal judgment settling the *Agent Orange* case, and their actions threatened to jeopardize the entire *Agent Orange* settlement. *Amici* never mention these inconvenient

## II. THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIMS AS BARRED BY THE *AGENT ORANGE* CLASS SETTLEMENT

Petitioners also contend, in summary fashion, that the district court erred in dismissing their claims as barred by the Settlement Agreement. See Ivy Pet. 25-30; Hartman Pet. 53-65. Petitioners do not dispute the district court's conclusion that they "are all members of the class barred from instituting new actions against the settling defendants." Pet. App. A51. Instead, they claim that it was improper to include them as part of the *Agent Orange* class. The courts below properly rejected that fact-bound argument on grounds that raise no issues suitable for review by this Court. In so doing, they carefully reviewed and reaffirmed the continuing "fundamental fairness" of the Settlement Agreement. Pet. App. A21; see also *id.* at A19-A21, A56-A59.

Only by disregarding the extensive and complex history of this litigation are petitioners able to assert (Ivy Pet. 28; Hartman Pet. 60) that this case would be an "excellent vehicle for any range of holdings" regarding the management of class actions. In fact, the *Agent Orange* class certification and settlement were approved by the district court and the court of appeals on the basis of unique facts and circumstances unlikely to occur again.

In 1984, when the defendants sought a writ of mandamus to overturn the certification of the *Agent Orange* class, the Second Circuit recognized, in rejecting the petition, that "this action is '*sui generis*, and national in its proportions' involving an extraordinary constellation of facts, parties and pleadings." 725 F.2d at 860 (quotation omitted). Moreover, in 1987, when the court of appeals affirmed the certification of the class and approved the settlement, it once again strongly expressed its skepticism that the class action device was appropriate in mass tort cases. 818 F.2d at 164-66.

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facts, much less explain why it is an "insult to state courts" (Am. Br. 1) for federal courts to enforce their orders and protect their judgments. In sum, the concerns of federalism and comity raised by *amici* are addressed to a hypothetical ruling allowing federal courts to order cases removed from state to federal court whenever they see fit. For reasons stated above, the actual facts of this case bear no resemblance to that hypothetical.

The Second Circuit was willing to allow a class action here only because of the "centrality of the military contractor defense" (*id.* at 166), which was (a) common to the cases of all plaintiffs, including those with "after-manifested injuries," (b) very strong, and (c) potentially dispositive of all of the claims. *Id.* at 167. Indeed, the court stated that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error." *Id.* at 166.

Thus, the *Agent Orange* litigation involved a *sui generis* class action that the court of appeals expressly distinguished from the "typical" mass tort litigation. In such circumstances, it is difficult to imagine a more inappropriate "vehicle" for this Court's review of any aspect of class action procedure, much less the fact-specific questions petitioners present, because "review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Review of this case to decide recurring class action questions also would be inappropriate because the settlement at issue occurred nearly ten years ago. In reliance on the Second Circuit's affirmance of the settlement order and this Court's denial of certiorari in 1988, some $164 million has been disbursed from the settlement fund to over 30,000 class members, including thousands who manifested injury *after* the May 7, 1984 settlement date. Special Master's Letter, *supra*. Petitioners do not even attempt to suggest how at this late date the clock could be turned back to 1984, in the event the class action settlement were to be set aside. Fortunately, however, petitioners' arguments in opposition to the settlement are no more compelling or worthy of review than they were when this Court denied certiorari in 1988.

### A. The Settlement Agreement Does Not Discriminate Against Claimants With After-Manifested Injuries

Petitioners contend (Ivy Pet. 26; Hartman Pet. 55-56) that it raises concerns of "basic fairness" to combine plaintiffs with after-manifested injuries in a class with other plaintiffs, because there is an "unavoidable" conflict of interest between the two groups. But petitioners make no effort to explain how this supposed conflict of interest actually affected the Settlement Agreement. Nowhere do

they attempt to rebut the district court's statement that all of the courts that considered the settlement were fully cognizant of the hypothetical conflict and "took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." Pet. App. A57-A58.

The facts also belie petitioners' concerns. As noted above (see page 6, *supra*), more than half of all disability claims paid by the fund were for after-manifested injuries, and more than half of all survivor claims paid by the fund (including claims filed by two of the named petitioners) were for deaths occurring after May 7, 1984. All of these claimants had their claims reviewed, and in appropriate cases received compensation, on a non-discriminatory basis.

Petitioners' attempt to characterize the court of appeals' decision as one that will affect future class action procedure is equally insubstantial. To begin with, as the court below itself noted, this case was atypical and would not be a model even for future cases filed in the Second Circuit. Pet. App. A21. Moreover, in the decade following the *Agent Orange* settlement, other courts, including those noted by petitioners (Ivy Pet. 25 n.33; Hartman Pet. 54 n.43), have opted for the appointment of a trustee to represent the interests of class members who have not yet manifested injury. Thus, not only has the unique *Agent Orange* experience not been followed in subsequent class actions, but this Court will have ample opportunity to consider the issue in a context where its resolution is far more material to the outcome of the litigation.

### B. The Inclusion In The *Agent Orange* Class Of Persons Who Had Not Yet Manifested Injury Satisfied The Standing Requirement Of Article III

Petitioners also contend, without elaboration, that under Article III of the Constitution it "may be illegitimate" to include in the *Agent Orange* class "persons who have manifested no perceptible injury" from their exposure to an allegedly harmful substance. Ivy Pet. 26-27; Hartman Pet. 56. Petitioners misunderstand both the application of the standing requirements of Article III to a class

action[9] and the nature of the "injury" necessary to satisfy those requirements.

There is, in fact, no question that a person exposed to a toxic substance, even if not yet manifesting injury and even if only "at risk," has standing under Article III to bring suit. Indeed, in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978), this Court held that a group claiming future exposure to radiation from a power plant that had not yet been built satisfied the "injury in fact" standard for standing under Article III. Similarly, in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), this Court held that a prisoner subjected to second-hand tobacco smoke, who had sustained no present injury, stated a valid claim under the Eighth Amendment. As a prerequisite to that holding, this Court must have determined that the prisoner had standing to assert such a claim. Thus, a party who has been exposed to a harmful substance has sustained an "injury in fact" and has not asserted a merely "hypothetical" or "abstract" claim.[10] The class in this case was properly defined to include members of the military who were "expos[ed]" to Agent Orange in Vietnam, regardless of when their symptoms first manifested themselves. See Pet. App. A12-A15

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[9] The concept of standing focuses on the party bringing suit. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). At the inception of a class action, the only party before the court is the *named plaintiff*. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Petitioners nowhere suggest that the named plaintiffs in the *Agent Orange* class action failed to allege actual injury or lacked standing to act as class representatives. Rather, petitioners focus solely on their own "standing" as absent class members. See Ivy Pet. 26-27; Hartman Pet. 56. Once threshold individual standing by the class representative is met, however, "a proper party to raise a particular issue is before the court, and *there remains no further separate class standing requirement in the constitutional sense.*" 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 2.05 at 2-28 (3d ed. 1993) (emphasis added).

[10] Petitioners' reliance (Ivy Pet. 27; Hartman Pet. 57 n.46) on the dissent in *Hoffman-La Roche Inc. v. Sterling*, 493 U.S. 165, 174 (1989), is puzzling. The dissenters in *Hoffman-La Roche* explicitly recognized that a court has power over the parties to a pending case, such as members of the *Agent Orange* class, and questioned only the extension of that power to members of the public at large who were not parties to the action. See *id.* at 177-78.

(holding that "at-risk" veterans suffered a "personal injury" under New York law).

### C. The Notice Provided To Members Of The *Agent Orange* Class Comported With Due Process And Cannot Justify Overturning The Class Settlement

Petitioners contend (Ivy Pet. 28-29; Hartman Pet. 62-64) that they were denied their due process rights to adequate representation and notice when they were included in the plaintiff class. Petitioners' fact-bound contentions, however, have already been considered and rejected in two rounds of litigation before the district court and the court of appeals. Furthermore, on two previous occasions, this Court chose not to review any of the issues relating to the district court's certification of a class in the *Agent Orange* litigation. See 484 U.S. 1004 (1988); 465 U.S. 1067 (1984).

Petitioners complain that they did not personally receive notice of the class certification and settlement, or were not in a position to understand the notice if they did receive it. See Ivy Pet. 28; Hartman Pet. 60-62. But the concept of adequate notice does not require that each class member receive actual notice. Rather, notice to absent class members must be the "best *practicable* 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). In 1987, the court of appeals, in a decision this Court declined to review, considered and expressly rejected the notion that each class member had to receive actual notice, and further held that the absent class members *had* been given the best notice practicable under the circumstances. 818 F.2d at 167-69. The court below reaffirmed those conclusions in this case. Pet. App. A16-17.[11]

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[11] The Hartman petitioners also suggest (Pet. 43-47) that the removal of this case from state to federal court amounted to a denial of the right of collateral attack. However, the court of appeals denied only petitioners' claim that their choice of a Texas forum for their collateral attack was unchallengeable. Pet. App.

In *Battle v. Liberty National Life Insurance Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (11th Cir. 1992), cert. denied, 113 S. Ct. 2999 (1993), a collateral attack in state court was stayed in favor of federal court adjudication to prevent interference with the administration of an ongoing class action settlement. The district court in *Battle* upheld the settlement, noting that because the interests of absent class members were the same as those who received actual notice, "the latter could adequately speak for [absent class members] vis-a-vis the named plaintiffs and class counsel." 770 F. Supp. at 1520. The court also stated, in a conclusion that is directly applicable to this case:

> In closing, the court observes that however substantively disadvantageous the settlement may have been to these movants, there are substantial equities which at this late date fall on the other side of the equation. This court correctly noted in its 1987 injunction order that a complex judgment, constructed after extensive litigation, materially affecting the rights of millions of individuals, and on which all parties have substantially relied for fourteen years, "should not lightly be torn down." Whatever the shortcomings of the notice provided to policyholders by the court in 1977, they are insufficient to justify relief under the constitutional wrecking ball of Rule 60(b)(4).

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A11. Petitioners' collateral attack on due process grounds was fully presented and considered anew in the proceedings below. As in any collateral attack, the district court, upon determining that petitioners were properly members of the *Agent Orange* class, enforced the Settlement Agreement and dismissed the claims. Petitioners cannot claim that they were denied the right of collateral attack simply because that attack was unsuccessful. *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), and *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, No. 92-1988 (Oct. 4, 1993), both involve special considerations applicable to no-opt-out class actions and are inapposite here. *See Carlough v. Amchem Products Inc., supra* (explaining and distinguishing *In re Real Estate Title* in opt-out class action). Moreover, while the *Agent Orange* Settlement Agreement bars subsequent state court suits by class members, the class action settlement underlying *In re Real Estate Title* and *Brown* did not.

*Id.* at 1522 (citations omitted).

If a reconsideration of the *Battle* class action could be likened to a wrecking ball, any reconsideration of the *Agent Orange* class action would resemble an earthquake. This Court, were it to accept the arguments advanced by petitioners, could not simply hold that petitioners were improperly included as parties to the Settlement Agreement. Rather, it would be required to void the portion of the Settlement Agreement barring further litigation against the defendants by class members with "after-manifested" injuries, and with it the Agreement itself. Thus, petitioners effectively seek not merely to exclude themselves, belatedly and inequitably, from a settlement entered into nearly a decade ago, but to render that settlement a nullity for the defendants and for the many thousands of class members who have already received or will receive disbursements from the $240 million *Agent Orange* fund.

If petitioners were successful in their challenge, the parties, the district court and the court of appeals could in the years ahead look forward to the Herculean task of determining what to do as a result of the belated, retroactive destruction of the May 1984 settlement. Fortunately, however, petitioners' attempt to destroy the settlement is based on specious arguments that were fully considered and properly rejected many years ago.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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